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## Touro Law Review

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Volume 37 | Number 2

Article 4

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2021

### RBG and Gender Discrimination

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#### Recommended Citation

Kaufman, Eileen (2021) "RBG and Gender Discrimination," *Touro Law Review*. Vol. 37 : No. 2 , Article 4.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol37/iss2/4>

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## RBG AND GENDER DISCRIMINATION

*Eileen Kaufman\**

When Ruth Bader Ginsburg visited Touro Law Center in 1997, she was asked which case was most satisfying to her. Her answer was *United States v. Virginia*.<sup>1</sup> I'm going to use my few minutes today to discuss that case and two others that I think best illustrate the role that Justice Ginsburg played in dramatically changing the law's response to claims of gender discrimination.

Three years after Justice Ginsburg joined the Court, she wrote the majority opinion in *United States v. Virginia*, which challenged the exclusion of women from Virginia Military Institute (VMI)—a publicly funded, highly prestigious institution.<sup>2</sup> The program at VMI was clearly not for everyone—it was marked by “physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”<sup>3</sup> But, as Justice Ginsburg said, the issue wasn't whether anyone should be *forced* to attend, it was whether Virginia could “constitutionally exclude “women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”<sup>4</sup>

The state defended its exclusion of women from VMI by arguing that admitting women would destroy the school.<sup>5</sup> But Justice Ginsburg rejected that as the classic argument that historically has been used to keep women out of professions—like law, medicine, police forces, and military academies—and held that the exclusion of women was unconstitutional discrimination in violation of the Equal Protection clause.<sup>6</sup>

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<sup>1</sup> 518 U.S. 515 (1996).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 522.

<sup>4</sup> *Id.* at 542.

<sup>5</sup> *Id.* at 540.

<sup>6</sup> *Id.* at 546.

Given the confirmation of Judge Amy Coney Barrett, who clerked for Justice Scalia and refers to him as her mentor, it's worth mentioning that the sole dissent in the VMI case was written by Justice Scalia.<sup>7</sup> Scalia would have upheld the state's exclusion of women because, in his opinion, challenges like this should not be heard by the courts - they should be left to the political process to resolve.<sup>8</sup> In other words, when the majority wants to change things, it will. Time will tell whether this philosophy will be embraced by Justice Barrett.

The next case I'd like to describe is *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*<sup>9</sup> Lilly Ledbetter was an area manager for Goodyear Tire who was paid far less than her male counterparts over many years.<sup>10</sup> She brought a pay discrimination suit under Title VII and despite the fact that the jury found that she had indeed been paid less than the men, she lost her case in a 5-4 decision because she did not file her claim within 180 days of receiving her *first* paycheck.<sup>11</sup>

Justice Ginsburg wrote a blistering dissent where she chided the majority for being clueless about the invidious way that discrimination against women operates.<sup>12</sup> She pointed out the obvious—that the discrimination is reflected in every paycheck Lilly Ledbetter received—not just her first one.<sup>13</sup> How could she have known when she first started working that she was being paid less than the men?

Justice Ginsburg ended her dissent by explicitly calling on Congress to correct the error that the majority created.<sup>14</sup> And Congress did just that and passed the Lilly Ledbetter Act of 2009, which President Obama signed into law in 2010.<sup>15</sup> So even when writing in dissent, Justice Ginsburg managed to move the law towards gender equality.

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<sup>7</sup> *Id.* at 566.

<sup>8</sup> *Id.* at 567-571.

<sup>9</sup> *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), overturned by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6.

<sup>10</sup> *Ledbetter*, 550 U.S. 618. at 621.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 645.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 661.

<sup>15</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6.

Lilly Ledbetter said, upon hearing of Ruth Bader Ginsburg's death, "She changed my life and she changed the country."<sup>16</sup>

Let me end by mentioning the case that Justice Ginsburg said was the single most satisfying of her litigation career, *Weinberger v. Wiesenfeld*.<sup>17</sup> She told this story when she spoke at Touro in 1997. She described Steven Wiesenfeld, whose young healthy pregnant wife died of an embolism when delivering their son Jason.<sup>18</sup> Steven vowed to care for the child, he quit his full-time job, and he applied for Social Security child in care benefits but was denied.<sup>19</sup> Widows could receive these benefits, but not widowers.<sup>20</sup> The reason for the difference in treatment was that women were presumed to be financially dependent, but men were not.<sup>21</sup> Steven wrote a letter to the editor of his local newspaper in NJ, describing his unsuccessful attempt to get benefits.<sup>22</sup> He said he was sick and tired of women's liberation and urged someone to tell this story to Gloria Steinem.<sup>23</sup> His complaint was referred to the ACLU and Ruth Bader Ginsburg litigated the case, along with her students.<sup>24</sup> They won a unanimous decision in the Supreme Court, which found that the social security policy was unconstitutional.<sup>25</sup> When Justice Ginsburg told this story in the Touro auditorium, she added that Jason was 2 when the Court rendered its decision, that he was now a third-year student at Columbia Law School, and that she was about to officiate at his wedding.

I end with that story because it underscores Ruth Bader Ginsburg's lasting legacy. Her lifelong project, both as a litigator and as a Supreme Court justice, was to break down gender stereotypes, reflected in society and in the law. It was her advocacy that finally

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<sup>16</sup> Ali Velshi, *Lilly Ledbetter remembers Ruth Bader Ginsburg: 'She changed my life, and she changed the country,'* MSNBC (Sept. 19, 2020) <https://www.msnbc.com/ali-velshi/watch/lilly-ledbetter-remembers-ruth-bader-ginsburg-she-changed-my-life-and-she-changed-the-country-92134981699>.

<sup>17</sup> 420 U.S. 636 (1975).

<sup>18</sup> 420 U.S. 636 (1975).

<sup>19</sup> Touro Law Center, *Justice Ruth Bader Ginsburg Visited Touro Law Center as Distinguished Jurist in Residence*, YOUTUBE (Sept. 24, 2020), <https://www.youtube.com/watch?v=KCVvxXnON00> (This video is of Justice Ginsburg's public lecture given at Touro Law Center on September 18, 1997).

<sup>20</sup> *Wiesenfeld*, 420 U.S. at 640.

<sup>21</sup> *Id.* at 644.

<sup>22</sup> Touro Law Center, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

moved the Court away from its role of benevolent protector of women, which as RBG famously argued, kept women in a cage not on a pedestal.<sup>26</sup>

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<sup>26</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).